

Legal Bulletin No. 218
Force Majeure

By Northwest Multiple Listing Service
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1. Introduction

This bulletin summarizes the new NWMLS form – Form 22FM (Force Majeure and Closing Addendum). “Force Majeure” is a French term that translates as “superior force” and a “force majeure event” is an event or effect that can be neither anticipated nor controlled.

Many contracts contain a “force majeure clause” allocating risk between the parties if performance of the contract becomes impossible or impracticable in the event of force majeure. Common examples of force majeure events include acts of nature (floods, earthquakes, hurricanes), acts of people (war, riots, strikes), and epidemics (a widespread occurrence of an infectious disease). Events and occurrences associated with the recent COVID-19 (coronavirus) epidemic may qualify as a force majeure event that may excuse or delay performance of a contractual obligation.

New Form 22FM provides for extensions of contingencies/conditions and the closing date in the purchase and sale agreement for a limited amount of time should a force majeure event occur.

2. Definition of Force Majeure Event

Form 22FM defines a “Force Majeure Event” as “an occurrence that is beyond the control of the party affected and could not have been avoided by exercising reasonable diligence, making the means of performance objectively impossible. Force Majeure Events includes acts of God, war, riots, strikes, fire, floods, epidemics, or other similar occurrences.”

Currently, the most common example of a force majeure event related to COVID-19 (coronavirus) is a delay in recording the closing of a sale due to staffing limitations of a county recording office. This is an event that is beyond the control of the parties and could not have been avoided, making performance of a timely closing impossible.

While no one can predict what other force majeure events may arise, other examples may include certain government directives (e.g. a shelter-in-place order) that would prevent a buyer from timely completing an inspection of the property because the selling broker, buyer, and/or inspector are unable to lawfully access the property. Similar issues could cause unavoidable delays in appraisals being timely completed and other financing matters. There are likely a myriad of other issues that cannot be contemplated in advance by the parties.

3. Contingencies and Conditions

Form 22FM provides that, if through no fault of the parties and by reason of a force majeure event, any contingency or condition in the agreement cannot be timely completed, then all the time periods associated with that contingency or condition (and any related notices and responses thereto) will be extended for an amount of time agreed to in the form.

For example, the parties reach mutual acceptance on March 25th and the buyer has a ten day inspection contingency. On March 26th, a shelter-in-place order goes into effect for two weeks (until April 9th) that prevents the selling broker, buyer, and inspector from lawfully accessing the property. The parties agree in Form 22FM that any contingency or condition will be extended ten days should a force majeure event occur. The original inspection contingency would have expired on Monday, April 6th. Form 22FM would extend the contingency to April 16th, including all the related notice and response time periods.

Note that calculating extension of contingency time periods due to force majeure events may be somewhat complicated. The listing broker and selling broker should cooperate and work together to ensure that the parties have the same expectations with regard to the timelines in the agreement (similar to when the parties reach mutual acceptance).

4. Automatic Extension of Closing

Form 22FM provides that, if through no fault of the parties and by reason of a force majeure event, the sale of the property cannot be timely closed on the Closing Date, the Closing Date shall be extended for an agreed upon period of time – the Extended Closing Date. If the sale of the property cannot be timely closed by the Extended Closing Date, the transaction terminates and the earnest money is refunded to the buyer.

5. Possession Date

The final paragraph of Form 22FM addresses the Possession Date. The parties should decide if the Possession Date will occur on the Extended Closing Date (should an automatic extension of closing occur) or on a different date. Note that all of the risks, considerations, and other issues that relate to early or delayed possession still exist.

6. Conclusion

Parties to an existing purchase and sale agreement should consider amending their agreement to include Form 22FM. Buyers and sellers who are not yet under contract, should consider using Form 22FM with new agreements for the foreseeable future.

Form 22FM (Force Majeure and Closing Addendum) is currently available on Xpress Forms and Transaction Desk. NWMLS will not print hard copies of this form.